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of any loss to the complainant.²¹⁰ If the defendant failed to pay the fine he could be imprisoned without any inquiry into his ability to comply.²¹¹ A fine cannot be considered remedial in the absence of loss. Nor can imprisonment be a valid method of coercion where the defendant lacks the financial ability to comply with the court order.

The procedure sought to be upheld by the State in *Vail* seriously infringed upon the rights of judgment debtors who failed to comply with show cause orders. The State's interest in rendering enforceable judgments does not outweigh an individual's constitutional right to due process. Hopefully, the legislature will act quickly upon the recommendations of the *Vail* court and incorporate into the existing statutory framework safeguards sufficient to protect the interests of all parties involved.

LANDLORD AND TENANT

Prior judgment available as defense but not counterclaim in summary proceeding for rent.

In actions by landlords for nonpayment of rent, the New York courts have exhibited an increasing awareness of the need to protect tenants' rights.²¹² Recently, in *Myack v. Aruca*,²¹³ Judge Harbater of the New York City Civil Court, Queens County, addressed the question whether a tenant can interpose a prior New York judgment as a setoff in his landlord's action for rent. The court concluded that while the tenant could not assert the earlier judgment as a counterclaim, he was entitled to raise the earlier judgment as a defense since it could be equated with partial payment of the rent due.²¹⁴ Judge Harbater believed the interposition of the

²¹⁰ See note 198 *supra*.

²¹¹ See note 199 *supra*.

²¹² In New York and other jurisdictions, the rights of tenants are continually being expanded. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) (warranty of habitability implied in all leases by operation of law; breach thereof gives rise to normal remedies for breach of contract); *Weidman v. Tomaselli*, 81 Misc. 2d 328, 365 N.Y.S. 2d 681 (Rockland County Ct. 1975) (lease provision requiring tenants to pay additional sum as rent upon commencement of any proceeding by landlord, irrespective of landlord's success, held unconscionable); *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y.C. Civ. Ct. N.Y. County 1971) (tenants may raise defenses against payment where landlord has violated law so as to substantially affect habitability of premises); Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L. REV. 489 (1971); Comment, *Tenant Remedies for a Denial of Essential Services and for Harassment—The New York Approach*, 1 FORDHAM URBAN L.J. 66 (1972).

²¹³ 174 N.Y.L.J. 105, Dec. 2, 1975, at 9, col. 3 (N.Y.C. Civ. Ct. Queens County).

²¹⁴ *Id.*, at cols. 3-4.

counterclaim was precluded by CPLR 5014 which codifies New York's long-existing policy²¹⁵ of limiting the right to bring an action on a money judgment entered in a court of this state.²¹⁶ Designed to prevent multiplicity of lawsuits and to shield judgment debtors from harassment,²¹⁷ CPLR 5014 provides that an action on a money judgment between the original parties will be permitted only in three instances: (1) where 10 years have elapsed since the judgment was originally docketed; (2) where the judgment was entered by default and the summons was served other than by personal delivery; or (3) where the court in its discretion deems that such an action is proper.

The landlord in *Myack* brought a summary proceeding against his tenant on an undisputed claim for unpaid rent in the amount of \$298.36. The defendant tenant, however, had previously obtained a judgment against the landlord for \$223.20 which he wished to offset against the rent due.²¹⁸ The landlord contended that the tenant's prior judgment in the small claims court could not be asserted as either a setoff or a counterclaim.²¹⁹ Noting that this was a question of first impression, the court ruled that the tenant could not counterclaim on the judgment because a counterclaim constitutes a cause of action,²²⁰ and CPLR 5014 restricts the right

²¹⁵ CPLR 5014 is substantially the same as its predecessor in the CPA. See CPA 484; 5 WK&M ¶ 5014.02.

²¹⁶ See 174 N.Y.L.J. 105, at 9, cols. 3-4. A cause of action on a judgment not entered in a New York State court is not subject to the restrictions imposed by CPLR 5014. See, e.g., *Molea v. Eppler*, 97 N.Y.S.2d 222 (New Rochelle City Ct. 1950) (counterclaim permitted on judgment entered in New York federal court); cf. *Morton v. Palmer*, 14 N.Y.S. 912 (Sup. Ct. 1st Dep't 1891) (restriction of action on judgment inapplicable to judgment of federal court sitting in New York). See also 5 WK&M ¶ 5014.01. This is because judgments of any courts outside New York, if entitled to full faith and credit, "may be enforced either by filing in the office of a county clerk or by an action." *Id.*, at 50-201. If such a judgment is entered in New York, however, CPLR 5014 would presumably govern its subsequent enforcement. *Id.*

²¹⁷ 5 WK&M ¶ 5014.01, at 50-200. In *Rando v. National Park Bank*, 137 App. Div. 190, 191-92, 121 N.Y.S. 1048, 1049 (1st Dep't 1910), the court observed that allowing an action on a judgment may be of no value to the judgment creditor, may be oppressive to the judgment debtor because of the recovery of additional costs, and may result in a continuous stream of judgments based on the same underlying cause.

²¹⁸ 174 N.Y.L.J. 105, at 9, col. 3. RPAPL § 743 permits the interposition of most defenses or counterclaims in a summary proceeding. The types of defenses and counterclaims which may be interposed are many and varied. See, e.g., *Cornell v. Dimmick*, 73 Misc. 2d 384, 342 N.Y.S.2d 275 (Binghamton City Ct. 1973) (retaliatory eviction is valid defense to summary dispossession proceeding); *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y.C. Civ. Ct. N.Y. County 1971) (landlord's violation affecting habitability of the premises is valid defense to nonpayment proceeding); 2300 Concourse Realty Corp. v. Klug, 201 Misc. 179, 111 N.Y.S.2d 168 (N.Y.C. Mun. Ct. Bronx County 1952) (landlord's commingling of tenant's security deposit justifies tenant's counterclaim for its return).

²¹⁹ 174 N.Y.L.J. 105, at 9, col. 3.

²²⁰ CPLR 3019(a) provides in pertinent part that "[a] counterclaim may be any cause of action in favor of one or more defendants . . . against one or more plaintiffs . . ." See also *Mook v. Merdinger*, 18 App. Div. 2d 983, 238 N.Y.S.2d 609 (1st Dep't 1963) (mem.) (counterclaim must state a cause of action).

to bring a cause of action on a judgment to certain limited circumstances not found in the present situation.²²¹ Judge Harbater disposed of the case by declaring that the prior judgment was the equivalent of payment and therefore was available as a defense to the landlord's claim for rent. Accordingly, the court granted the tenant his setoff in the amount of the earlier judgment and awarded the landlord the balance of the rent due.²²²

In reaching its decision, the court apparently failed to consider the fact that CPLR 5014 also permits an action on a judgment where it is deemed appropriate in the court's discretion.²²³ It is surprising that the court indulged in the fiction of equating a prior judgment with the defense of payment²²⁴ when it could have achieved the same result by exercising its discretionary power and allowing a counterclaim on the tenant's judgment.²²⁵ Since the tenant in *Myack* had apparently been unable to enforce his judgment by conventional procedures,²²⁶ the case seems particularly appropriate for the court's exercise of its discretionary power under CPLR 5014.²²⁷ Moreover, public policy considerations underlying the restriction of actions on judgments, *viz* the avoidance

²²¹ 174 N.Y.L.J. 105, at 9, cols. 3-4.

²²² *Id.*, col. 4.

²²³ See CPLR 5014(3). Since this discretionary provision is rarely invoked, few guidelines have been developed concerning what factors will motivate a court to deem that an action on a judgment is appropriate. It has been observed, however, that the use of discretion would be appropriate when all other alternatives have proven inadequate in securing payment for the judgment creditor. 5 WK&M ¶ 5014.06.

²²⁴ The most obvious legal defense in a nonpayment proceeding is payment of the amount due. See, e.g., *Hite v. Haley*, 188 N.Y.S. 906 (App. T. 1st Dep't 1921); *Levy v. Winkler*, 59 Misc. 482, 110 N.Y.S. 997 (App. T. 1908). Payment of less than the whole amount due will result in a setoff for the amount paid. *Ferris v. Rashbaum*, 42 N.Y.S.2d 363 (App. T. 1st Dep't 1943). The *Myack* court's equation of a prior judgment with the defense of payment, however, is a novel position. The court itself indicated that a tenant's prior judgment had never before been deemed to constitute the defense of payment. See 174 N.Y.L.J. 105, at 9, col. 3.

²²⁵ Had the *Myack* court exercised its discretion and permitted the counterclaim on the judgment, the counterclaim would apparently have fulfilled all other procedural requirements. First, it would have met the requirement that it be against the landlord in the same individual capacity that he held in the prior action. See, e.g., *Grierson v. Wagar*, 78 Misc. 2d 479, 357 N.Y.S.2d 351 (Sup. Ct. Rensselaer County 1974). See also *Ehrlich v. American Moninger Greenhouse Mfg. Co.*, 26 N.Y.2d 255, 257 N.E.2d 890, 309 N.Y.S.2d 341 (1970); 3 WK&M ¶ 3019.02. Second, even though counterclaims are subject to being severed if they are so unrelated as to be disruptive, see 7B MCKINNEY'S CPLR 3019, commentary at 216 (1974), this clearly would not have presented a problem in *Myack* since the prior action arose out of the landlord-tenant relationship, see 174 N.Y.L.J. 105, at 9, col. 3, and since the claims involved were of a very simple nature.

²²⁶ 174 N.Y.L.J. 105, at 9, cols. 3, 4. Additionally, the *Myack* court noted that the tenant's prior judgment was awarded in small claims court and that such judgments are particularly difficult to collect. *Id.*, col. 4. For more detailed discussions of this problem, see Driscoll, *DE MINIMIS CURAT LEX—Small Claims Courts in New York City*, 2 FORDHAM URBAN L.J. 479, 501-03 (1974); Comment, *The Nature and Operation of the New York Small Claims Courts*, 38 ALBANY L. REV. 196 (1974).

²²⁷ See note 223 *supra*.

of harassment of judgment debtors and multiplicity of suits, are in no way frustrated by permitting a tenant to counterclaim in an action commenced by the landlord.

A possible explanation for the court's action is suggested by the fact that the holding is limited to judgments which are "equal to or less than the amount of rent due."²²⁸ It is submitted that the court wished to provide a tenant with a remedy which would serve only as a defense in a nonpayment proceeding, rather than grant a counterclaim which would result in affirmative relief in situations wherein the prior judgment exceeds the landlord's rent claim.²²⁹ Under either theory, the result in *Myack* would have been the same since the judgment involved did not exceed the rent due. Nevertheless, the court's endorsement of the latter approach would have been more consistent with the current trend towards greater tenant rights.²³⁰ Although the *Myack* court clearly recognized the need for affording tenants greater rights and flexibility in enforcing judgments against their landlords, the court did not go far enough. The practitioner who represents a tenant in a situation similar to *Myack* should certainly attempt to use a prior judgment as a defense of payment. Where the judgment is greater than the amount of rent owing, however, the practitioner would be well advised to request the court to exercise its discretion and allow the tenant's counterclaim on the previously obtained judgment.

DEVELOPMENTS IN NEW YORK PRACTICE

Judicial and legislative pronouncements on citizen-taxpayer standing.

The adjudication of legal interests is governed in part by the shifting contours of constitutional and institutional standing requirements. Directed at the party seeking access to the judicial process, the standing doctrine reflects the judiciary's insistence on an adversary presentation and its interpretation of the proper

²²⁸ 174 N.Y.L.J. 105, at 9, col. 4 (emphasis in original).

²²⁹ The basic difference between a defense and a counterclaim is that a defense "look[s] only to defeating the plaintiff's claim," 7B MCKINNEY'S CPLR 3018, commentary at 152 (1974), whereas a counterclaim is proper "whether it will merely diminish or defeat the relief sought by the plaintiff or it seeks to recover an amount in excess of the plaintiff's claim." 3 WK&M ¶ 3019.02, at 30-427.

In *Molea v. Eppler*, 97 N.Y.S.2d 222 (New Rochelle City Ct. 1950), a defendant tenant asserted a counterclaim on a prior federal judgment which exceeded the landlord's claim, and the court simply offset the rent due against the prior judgment and granted the tenant a judgment for the excess. The *Myack* court noted that but for the fact that *Molea* involved a prior federal judgment not subject to the restrictions of CPLR 5014, see note 216 *supra*, it would have been persuasive precedent. 174 N.Y.L.J. 105, at 9, col. 4.

²³⁰ See note 212 and accompanying text *supra*.